FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

November 6, 2003

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE WYOMING ALASKA COMPANY, INC., doing business as Trailside General Store, doing business as Wyoming Alaska Leasing Company, doing business as WACO, Inc., Debtor.	BAP No. UT-03-022
JONES, WALDO, HOLBROOK & MCDONOUGH, Appellant, v. WYOMING ALASKA COMPANY, INC.; STATE OF ALASKA; RED ROSE RENTALS; COMMERCE AND INDUSTRY INSURANCE CO.; and BRAD HALL & ASSOCIATES, Appellees.	Bankr. No. 01C-21725 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before CORNISH, MICHAEL, and McNIFF, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The parties did not request oral argument. After examining the briefs and appellate record, the court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

is therefore ordered submitted without oral argument.

The law firm of Jones, Waldo, Holbrook & McDonough (Jones Waldo) appeals the order of the United States Bankruptcy Court for the District of Utah granting the Motion to Approve Compromise of Controversy and to Disburse Funds filed by the State of Alaska on behalf of the Alaska Department of Environmental Conservation (Alaska) and Red Rose Rentals, Inc. (Red Rose). We reverse and remand.

Appellate Jurisdiction

A bankruptcy appellate panel, with the consent of the parties, has jurisdiction to hear timely-filed appeals from final judgments, orders and decrees of bankruptcy courts within the circuit. 28 U.S.C. § 158(a)-(c)(1); Fed. R. Bankr. P. 8002(a). An order approving a compromise and settlement is a final, appealable order. *In re Cajun Elec. Power Co-op, Inc.*, 119 F.3d 349, 354 (5th Cir. 1997); *In re Moorhead Corp.*, 208 B.R. 87, 89 (1st Cir. BAP 1997), *aff'd*, 201 F.3d 428 (1st Cir. 1998).

Standards of Review

The approval of a compromise is within the sound discretion of the bankruptcy court and is reviewed for an abuse of discretion. *Kopp v. All American Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997). Under the abuse of discretion standard, the appellate court will not disturb the trial court's decision unless it has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice. *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994). The jurisdiction of the bankruptcy court is a question of law reviewed *de novo*. *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd, Inc.)*, 40 F.3d 1084, 1085 (10th Cir. 1994).

Background

The Debtor, Wyoming Alaska Co., Inc. (Debtor), operated a convenience store known as the Trailside General Store in Homer, Alaska (Homer Store) on property leased from Red Rose. During 1998 and 1999, gasoline leaked from the Debtor's

underground storage tank system at the Homer Store location.

The Debtor maintained a Storage Tank Third-Party Liability, Corrective Action and Cleanup Policy (Policy) issued by Commerce and Industry Insurance Company (C&I), with a per occurrence limit of $1,000,000. As the lessor of the real property, Red Rose was liable for gas contamination under Alaska law, and therefore, was named an additional insured on the Policy.

After the discovery of the leakage, the Debtor made a claim under the Policy. Initially, C&I honored the claim and covered some costs associated with remediation and cleanup. However, C&I later refused to pay further cleanup costs, and the cleanup efforts stopped.

When the cleanup ceased, three lawsuits were commenced. In July 2000, Alaska filed a lawsuit against the Debtor in the Superior Court for the State of Alaska (Alaska Lawsuit). In September 2001, Alaska added Red Rose and C&I as party defendants, alleging that Red Rose also was liable for the cleanup and was entitled to coverage under the Policy.

The other two lawsuits were also commenced in July 2000. The Debtor and its principals filed a lawsuit against C&I in the United States District Court for the District of Utah (Utah Lawsuit), and a similar, separate action against Sentry West Insurances Services (Sentry West Lawsuit). The Debtor alleged claims that C&I breached the Policy and a covenant of good faith and fair dealing for failure to pay cleanup costs.

In February 2001, the Debtor filed its voluntary Chapter 11 petition for relief in the United States Bankruptcy Court for the District of Utah. After the Debtor's counsel in the insurance lawsuits withdrew, the Debtor employed Jones Waldo to prosecute the Utah Lawsuit and the case against Sentry West. The representation agreement between the Debtor and Jones Waldo provides for a contingency fee of 33**a**% of all sums recovered from the defendants in the C&I and Sentry West Lawsuits. The bankruptcy court approved Jones Waldo's employment.

Both Alaska and Red Rose filed proofs of claim in the bankruptcy case for cleanup, and Alaska filed a claim for civil assessments. To resolve differences with Alaska over its proof of claim, the Debtor and Alaska entered into a settlement (Claim Settlement), which was approved by the bankruptcy court. The Claim Settlement provided for allowance of a claim secured by a statutory lien against the Debtor's claims for relief against C&I for coverage. The Debtor's claims for relief against C&I for bad faith are not encumbered by Alaska's lien. The Claim Settlement also provides an allocation scheme of insurance proceeds to the secured, administrative and unsecured portions of the claim, subject to payment of attorney fees incurred to collect those proceeds.

The parties to the Alaska and Utah Lawsuits attempted to negotiate a global settlement but were not successful. In October 2002, Alaska, Red Rose and C&I entered into a settlement agreement resolving the claims pending among themselves in the Alaska Lawsuit (Third Party Settlement). Under the Third Party Settlement, C&I agreed to pay Alaska $818,000. Alaska agreed to release Red Rose and C&I from Alaska's claims against them, and the parties agreed the payment would result in a reduction of the Debtor's liability to Alaska by the same amount. As a condition of settlement, C&I required bankruptcy court approval of the Third Party Settlement.

Accordingly, Alaska filed a Motion to Approve Compromise of Controversy and to Disburse Funds (Motion to Approve Compromise) in the bankruptcy court, to which the Debtor objected. In its objection, the Debtor argued that the Third Party Settlement among Alaska, Red Rose and C&I deliberately circumvented the provisions of the Claim Settlement by limiting funds available for collection costs incurred by the Debtor, i.e., Jones Waldo's contingency fee.

The Debtor's objection was drafted by counsel from Jones Waldo, and was filed by the Debtor's general bankruptcy counsel, Gregory Adams. At the hearing on the Motion to Approve, Mr. Adams presented the Debtor's objection. Jones Waldo did not

file its own objection, but was present at the hearing.

The bankruptcy court apparently concluded the insurance policy was property of the estate and that the court had jurisdiction to rule on the motion. On the record, the bankruptcy court characterized the dispute as an issue over how the payment to Alaska would be allocated against Alaska's proof of claim "in the debtor's estate." After hearing arguments on the motion, the bankruptcy court offered to defer a ruling on the allocation issue and to approve the settlement.

After further discussions among counsel and the court, the bankruptcy court continued the hearing. Without holding the continued hearing, the bankruptcy court entered its Order Approving Compromise of Controversy and Disbursement of Funds (Order Approving Compromise). In the Order Approving Compromise, the bankruptcy court approved the Third Party Settlement, ruled that the $818,000 payment "will reduce the State's judgment against the Debtor," and reserved "for another day" a ruling on the allocation issue. Jones Waldo timely appeals from the February 3, 2003, Order Approving Compromise.

Discussion

The court concludes Jones Waldo has standing to bring this appeal, and that the bankruptcy court had jurisdiction to rule on the settlement. However, this case must be reversed and remanded because the bankruptcy court did not enter findings and conclusions necessary for appellate review of the Order Approving Compromise.

Standing

Alaska and C&I challenge Jones Waldo's standing to pursue this appeal. In bankruptcy cases, an appellant must show it is a "person aggrieved" in order to have appellate standing. *Weston v. Mann (In re Weston)*, 18 F.3d 860, 863 (10th Cir. 1994). An appellant is a "person aggrieved" only if its "rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court." *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989).

Attendance and objection at a bankruptcy court proceeding are prerequisites of the "person aggrieved" standard. *Weston*, 18 F.3d at 864.

We conclude Jones Waldo's interest in its contingency fee is a pecuniary interest in the outcome that may be diminished by approval of the settlement. Even though Jones Waldo's objection was indirectly presented at the hearing by the Debtor, Jones Waldo has standing to bring this appeal.

Jurisdiction of the Bankruptcy Court

At the hearing on the Motion to Approve Compromise, the bankruptcy court questioned its subject matter jurisdiction to approve a settlement between third parties that did not involve the Debtor. The parties asserted that the bankruptcy court had jurisdiction over the settlement. However, this court has an independent obligation to determine the jurisdictional issue and will discuss the question briefly.

A bankruptcy court's subject matter jurisdiction is created and limited by 28 U.S.C. § 1334(b). That statute grants subject matter jurisdiction to the United States district courts over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). District courts may provide that "any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). The United States District Court for the District of Utah has done so pursuant to D.U. Civ. R. 83-7.1.

Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11. 28 U.S.C. § 157(b)(1); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (10th Cir. BAP 1997). Whether the bankruptcy court had jurisdiction to approve the Third Party Settlement depends upon application of principles stated in the Tenth Circuit case of *Gardner v. United States (In re Gardner)*, 913 F.2d 1515 (10th Cir. 1990).

In *Gardner*, the Tenth Circuit Court of Appeals ruled that a bankruptcy court does not have subject matter jurisdiction over a dispute between third parties unless the dispute involves property of the estate or affects the distribution of assets or the administration of the estate. If the administration of the estate is affected, the bankruptcy court has "related to" jurisdiction over the dispute. *Id*. at 1518.

The Policy in this case is a liability policy. Under the broad definition of estate property contained in 11 U.S.C. § 541(a)(1), the Policy is property of the estate. However, under the standards set out by the Fifth Circuit Court of Appeals in the case of *In re Equinox Oil Co., Inc.*, 300 F.3d 614 (5th Cir. 2002), the proceeds of the liability Policy are not property of the estate. *Id*. at 618-19 (applying the test of whether the debtor would have the right to receive and keep the proceeds).

Regardless, a consequence of the $818,000 payment to Alaska by C&I is a corresponding decrease in the Debtor's liability to Alaska. That decrease in liability may reduce the amount of Alaska's claim against the estate, in turn affecting the allocation of other estate funds to the creditors including Jones Waldo. Approval of the Third Party Settlement also could affect the Claim Settlement between the Debtor and Alaska. Under the *Gardner* analysis, the court concludes the bankruptcy court had "related to" jurisdiction over the Motion to Approve Compromise.

Adequate Findings & Conclusions

The issue in this appeal is whether the bankruptcy court abused its discretion in approving the Third Party Settlement. A decision to approve a settlement must be "'an informed one based upon an objective evaluation of developed facts.'" *Kopp v. All American Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997) (quoting *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989)).

The Debtor's Motion to Approve Settlement is a contested matter subject to the provisions of Fed. R. Bankr. P. 9014. That Rule makes the provisions of Fed. R.

Bankr. P. 7052 applicable to a contested matter. Rule 7052 incorporates Fed. R. Civ. P. 52(a), which requires a trial court sitting without a jury to make meaningful findings upon which appellate review may be premised. *Kopexa*, 213 B.R. at 1023.

We are unable to determine whether the bankruptcy court made an objective evaluation of the facts, because it took no evidence and made no findings. The bankruptcy court held a hearing by telephone, took no evidence, made no findings on the record, and continued the hearing. Later, without holding the continued hearing, the court entered its order without findings of fact or conclusions of law.

Both Alaska and C&I argue that findings of fact are not necessary to disposition of this appeal because the issues are strictly questions of law. The court disagrees. Alaska and C&I argue the merits based upon their version of the facts and presumed consequences. We cannot determine whether those are the facts relied upon by the bankruptcy court, reinforcing the need for an evidentiary hearing if necessary and proper findings.

Conclusion

This court is unable to determine whether approval of the settlement was an abuse of discretion. Therefore, the Order Approving Compromise is reversed, and the case is remanded to the bankruptcy court for the court to take evidence as necessary and to enter findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52.